

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

NICHOLAS GRAY, 6:15-cv-00647-BR  
Plaintiff, OPINION AND ORDER  
v.  
CAROLYN W. COLVIN,  
Commissioner, Social Security  
Administration,  
Defendant.

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**BROWN, Judge.**

This matter comes before the Court on Plaintiff's Motion (#21) for Equal Access to Justice Act (EAJA) Fees and Costs<sup>1</sup> in which he seeks an award of attorneys' fees pursuant to 28 U.S.C. § 2412.

For the reasons that follow, the Court **DENIES** Plaintiff's request for EAJA fees.

**BACKGROUND**

Plaintiff filed his application for DIB on September 25, 2011, and alleged a disability onset date of January 5, 2010. His application was denied initially and on reconsideration. An Administrative Law Judge (ALJ) held a hearing on December 12, 2013.

The ALJ issued a decision on December 20, 2013, in which he found Plaintiff is not entitled to benefits. That decision

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<sup>1</sup> Plaintiff does not claim any costs or expenses in his Motion.

became the final decision of the Commissioner on February 27, 2015, when the Appeals Council denied Plaintiff's request for review.

Plaintiff appealed the decision of the Commissioner to this Court. This Court reviewed the Commissioner's denial of benefits, and, after reviewing the record, the Court issued its Opinion and Order (#19) on June 13, 2016, reversing the decision of the Commissioner and remanding the matter pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings.

On August 25, 2016, Plaintiff filed this Motion (#21) for EAJA Fees. Plaintiff seeks an award of attorneys' fees in the amount of \$7,121.87.

#### STANDARDS

Under EAJA the Court may award attorneys' fees and costs to a plaintiff's attorney in an action against the United States or any agency or official of the United States if (1) the plaintiff is the prevailing party, (2) the Commissioner has not met her burden to show that her positions during the case were substantially justified or that special circumstances make such an award unjust, and (3) the requested attorneys' fees and costs are reasonable. 28 U.S.C. § 2412(d)(1)(A). See also *Perez-Arellano v. Smith*, 279 F.3d 791, 792 (9th Cir. 2002).

A "prevailing party" is one who has been awarded relief by the court on the merits of at least some of his claims. *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980). "Enforceable judgments and court-ordered consent decrees create 'the material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 604 (2001) (internal citation omitted).

A prevailing plaintiff is not entitled to attorneys' fees under EAJA when the Commissioner's positions were substantially justified. *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002). The Commissioner's positions are substantially justified if they are reasonably based both in law and fact. *Id.* (citing *Pierce v. Underwood*, 487 US. 552, 566 n.2 (1988)). The Commissioner's failure to prevail on the merits of his positions does not raise a presumption of unreasonableness. *U.S. v. Marolf*, 277 F.3d 1156, 1162 (9th Cir. 2002) (citing *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988)).

When the Commissioner opposes a claimant's fee request, she bears the burden to establish her positions at each stage of the proceeding were "substantially justified." *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998). See also *U.S. v. Real Property at 2659 Roundhill Drive, Alamo, Ca.*, 283 F.3d 1146, 1151 (9th Cir. 2002). To prevail, therefore, the Commissioner must

establish the positions taken by the Commissioner in opposition to the claimant's efforts to obtain Social Security benefits both in the proceedings before this Court and in the underlying administrative action were substantially justified. See *Lewis*, 281 F.3d at 1085-86.

The Commissioner's position "'must be justified in substance or in the main,' - that is, justified to a degree that could satisfy a reasonable person." *Gonzales*, 408 F.3d at 618 (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). "Put another way, substantially justified means there is a dispute over which 'reasonable minds could differ.'" *Gonzales*, 408 F.3d at 618 (citing *League of Women Voters of Cal. v. FCC*, 798 F.2d 1255, 1257 (9th Cir. 1986)).

#### DISCUSSION

This Court found the ALJ erred when he (1) excluded Plaintiff from the hearing during his wife's testimony, (2) failed to ask the VE whether his testimony was consistent with the DOT, and (3) made inconsistent findings in his "paragraph B" analysis at Step Three and in his assessment of Plaintiff's Residual Function Capacity (RFC). The Court concluded the first two errors were harmless. The Court, however, concluded the third error required remand for further clarification by the ALJ.

Plaintiff argues in his Reply<sup>2</sup> that he is entitled to attorneys' fees because the Commissioner's position was not substantially justified either at the administrative hearing or on review by this Court.

**I. The ALJ's error in excluding Plaintiff from the hearing when his wife testified.**

Plaintiff contends the ALJ's failure to comply with agency rules and regulations was not reasonable, and, therefore, the Commissioner's position was not substantially justified.

As noted in the Court's Opinion and Order (#19) on June 13, 2016, the Court concluded Plaintiff's exclusion from the administrative hearing was harmless error because it "was inconsequential to the ultimate nondisability determination by the ALJ." Opin. and Order (#19) at 12.

Plaintiff contends the ALJ failed to follow procedures set forth in the Hearings, Appeals and Litigation Law Manual (HALLEX) when he excluded Plaintiff from the hearing during his wife's testimony. Pl.'s Reply at 2. Plaintiff relies on *Gutierrez v. Barnhart*, 274 F.3d 1255 (9th Cir. 2001), to support his position that the ALJ's failure to follow the HALLEX procedure was not reasonable.

In *Gutierrez* the Ninth Circuit held the ALJ's failure to

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<sup>2</sup> In his Motion Plaintiff did not assert any bases for his requested fees other than he "is entitled to a reasonable attorney fee under EAJA . . . upon proper presentation to the Court."

complete a specific form for the evaluation of mental impairments and the failure to attach it to his decision as required by regulations was not reasonable. *Id.* at 1261. The regulation stated the form "must be completed" and "will be appended to the decision." 20 C.F.R. § 404.1520a(d). According to the *Gutierrez* court, there is not any ambiguity as to the requirements of this regulation, and, therefore, the failure to comply was not reasonable and the Commissioner's position was not substantially justified.

In contrast, the purpose of the HALLEX manual is stated in Chapter I-1-0-1 as follows:

Through HALLEX, the Deputy Commissioner for Disability Adjudication and Review conveys guiding principles, procedural guidance, and information to Office of Disability Adjudication and Review staff. HALLEX defines procedures for carrying out policy and provides guidance for processing and adjudicating claims at the hearing, Appeals Council, and civil action levels.

In *Moore v. Apfel* the Ninth Circuit noted the HALLEX manual "does not provide substantive rules." 216 F.3d 864, 868 (9th Cir. 2000). Instead it "is strictly an internal guidance tool, providing policy and procedural guidelines to ALJs." The court also held HALLEX "does not have the force and effect of law [and] . . . is not binding on the Commissioner." *Id.* at 868-69. The court, therefore, refused to review allegations of noncompliance with the manual. See also *Lockwood v. Comm'r. Soc. Sec. Admin.*, 616 F.3d 1068, 1072 (9th Cir. 2010). Thus, the Court concludes

on this record that the requirements of the HALLEX manual are not regulations "required" to be followed by the ALJ, and, therefore, the ALJ's error was harmless.

Accordingly, the Court concludes the ALJ's exclusion of Plaintiff from the hearing during his wife's testimony was not unreasonable or unjustified.

**II. The ALJ's error in failing to ask the VE whether his testimony was consistent with the DOT.**

The Court found the ALJ erred when he failed to ask the VE whether his opinion was consistent with the DOT, but the Court concluded the error was harmless because the VE and ALJ adequately explained the only possible inconsistency with the DOT. Opin. and Order (#19) at 16.

Plaintiff asserts Social Security Regulations impose "an affirmative responsibility to ask about any possible conflict between the VE . . . evidence and information provided in the DOT." SSR 00-4p. Plaintiff contends the ALJ's failure to comply with this regulation was not reasonable, and, therefore, the Commissioner's position was not substantially justified.

In *Massachi v. Astrue* the Ninth Circuit held for the first time that an ALJ may not rely on a VE's testimony regarding the requirements of a particular job without first inquiring whether the testimony conflicts with the DOT. 486 F.3d 1149, 1152-53 (9th Cir. 2007). The court noted, however, this procedural error could be harmless if the VE provided sufficient support for her

conclusion so as to justify any potential conflicts. *Id.* at 1154 n. 19.

Here the Court found the ALJ erred when he failed to ask the VE whether his opinion was consistent with the DOT, but the Court concluded the error was harmless because the VE and ALJ adequately explained the only possible inconsistency with the DOT. The Court concludes, therefore, the government's position was reasonable and substantially justified on this issue.

**III. The ALJ's error in failing to reconcile the inconsistency between his analysis in "Paragraph B" at Step Three and his assessment of Plaintiff's RFC.**

The Court remanded this matter for further proceedings on the basis that the ALJ erred when he made inconsistent findings between his "paragraph B" analysis at Step Three (that Plaintiff had "moderate difficulties" with concentration, persistence, and pace) and his assessment of Plaintiff's RFC (that Plaintiff had an "average ability" to perform sustained work activities related to concentration, persistence, or pace in an ordinary work setting "on a regular basis"). Opin. and Order (#19) at 14.

Plaintiff contends the Court's finding of error and Order remanding the case for further proceedings entitles Plaintiff to an award of attorneys' fees pursuant to EAJA. The Commissioner, however, contends because the ALJ's assessment of Plaintiff's RFC was based on and supported by medical evidence in the record, the ALJ's decision and the Commissioner's subsequent defense thereof

had a reasonable basis in law and fact despite the ALJ's inconsistent finding at Step Three that Plaintiff has "moderate" difficulties with concentration, persistence, and pace. As the Commissioner points out, an ALJ's RFC assessment of a claimant "adequately captures restrictions related to concentration, persistence, or pace where the assessment is consistent with restrictions identified in the medical testimony." *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008).

Here even though the Court noted the ALJ's RFC finding of average ability "may be supported by substantial evidence in isolation," the Court concluded in its Opinion and Order that the ALJ did not adequately explain the inconsistency between his Step Three analysis and his assessment of Plaintiff's RFC. The Court, therefore, remanded this matter to permit the ALJ to clarify his findings. Opin. and Order (#19) at 14. Nevertheless, because the ALJ's assessment of Plaintiff's RFC was largely "consistent with restrictions identified in the medical testimony," the Court concludes, therefore, that the Commissioner's position in this regard was not unreasonable nor substantially unjustified.

CONCLUSION

For these reasons, the Court **DENIES** Plaintiff's Motion (#21) for EAJA Fees and Costs.

IT IS SO ORDERED.

DATED this 4th day of October, 2016.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States District Judge